AUSTRALIAN ENERGY COUNCIL

Australian Government
Department of Climate Change, Energy, Environment, and Water
Electricity Markets Competition Policy Team

Submitted via email: PEMMreview@dcceew.gov.au.

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Strengthening the PEMM Act – Consultation Paper

The Australian Energy Council ('AEC') welcomes the opportunity to make a submission to the Department of Climate Change, Energy, Environment, and Water's (the 'Department') consultation on *Strengthening the Prohibiting Energy Market Misconduct provisions in the Competition and Consumer Act 2010 Consultation Paper* ('PEMM Act Review').

The Australian Energy Council is the peak body for energy retailers and generators operating in competitive markets. Our members generate and sell energy to over 10 million homes and businesses and are committed to delivering a reliable, affordable and decarbonised energy system for consumers. The AEC supports net zero by 2050 and recognises the electricity sector's role in reducing Australia's emissions. Our members are major investors in renewables, firming and storage technologies that are critical to ensuring customers continue to receive reliable and sustainable energy supply as we navigate the energy transition.

The decision to retain the PEMM Act has occurred in the absence of evidence that the Act is effective and ignores repeated concerns from industry and legal practitioners that its provisions are vague, disproportionate, and difficult to enforce. Not enough consideration has been given to balancing these elements of what makes a good law in concluding that the Act has a likely deterrent effect on detrimental market behaviour.

It is disappointing that instead of either repealing or improving the legal foundations of the Act, the Consultation Paper is now proposing to introduce new provisions. These new provisions are punitive and place a high level of regulatory risk on market participants. This might be acceptable if it were in response to a clear market failure, however this is not the case.

The Consultation Paper does not provide any clear explanation of the current regulatory gap that would necessitate introducing a symmetrical retail provision. If the concern is focused on customers priced above the Default Market Offer (DMO), then this would be better considered through the Australian Energy Market Commission's (AEMC) current Retail Pricing Review.

While the Paper does provide some reasons for the cross-market manipulation provision, these are not well-established and is mostly speculation about potential, future issues that have not yet emerged. This does not warrant such immediate and punitive regulation. It would be preferable for the Department, ACCC, market bodies, and industry to work together to better understand the opportunities and risks of AI trading, and related issues.

As the Department contemplates these provisions, attention should be given to the evolving market in which energy businesses are currently operating. The underlying cost of procuring energy is increasing because of structural changes to the market and this will be the reality for some time. Network costs, which operate on 5 year regulatory determination cycles, are a major driver of consumer bills and are expected to increase over the next decade.[1] Similarly, high

[1] See, for example, AEMO's Electricity Network Options Report.

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volatility in wholesale prices will continue as baseload generation retires, and the replacement technologies of renewables, gas firming, and storage are built out. These structural aspects to the energy transition should be more clearly acknowledged as they will have a significantly larger impact on affordability for customers over time.

The energy transition does also offer opportunities to customers through the uptake of consumer energy resources (CER) and the gradual shift to electrification. Retailers are investing in technologies and services to meet these evolving consumer needs and preferences, and it is important that unnecessary regulation does not limit the ability to develop and offer new products.

For these reasons, the AEC submits that neither provision should proceed.

If the provisions are implemented, there is additional information the Department should provide to improve the ability of the regulator to understand and interpret their intended meaning:

- A clear problem statement explaining the need for a symmetrical retail provision. This should contain an explanation of the perceived gap in the current regulatory framework, and why the Department has determined the PEMM Act is the best policy solution compared to alternatives, such as the AEMC Pricing Review.
- Acknowledgment of the structural changes that the energy transition is bringing to the energy market, and how this is increasing the cost to procure energy for retailers. There should be clearer explanation of what the Department means by reaching a "steadier state" and when that might arrive.

If the provisions are implemented, the Department should take steps to partially reduce the level of regulatory risk on market participants:

- For the retail provision, the burden of proof should remain with the regulator as this is standard legal practice. If there are issues with enforcing a provision, then that is because there is no clear contravention or it is a poorly written law. Aside from good legal practice, expecting retailers to retain data and records of reasons for all price changes would represent an enormously expensive compliance burden.
- For the cross-market manipulation provision, the scope should be narrowed to only prohibit behaviour that is done with "the purpose" of substantially lessening competition. The extended scope of "effect or likely effect" is too broad and could dissuade businesses from using new technologies that would otherwise deliver more efficient outcomes for customers.
- Publish regulatory guidance on what would and would not constitute cross-market manipulation (along the lines of the existing ACCC Guidelines on Part XICA) to explicitly recognise legitimate commercial practices.

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AEC comments on proposed new provisions

Proposal to make the retail provision symmetrical

The AEC's position is firmly in favour of Option 1: *Retain current retail pricing provision but make no further changes (do nothing).*

The Consultation Paper does not provide a clear problem statement or assessment of the existing regulatory gap that would necessitate this provision. There are a range of regulatory reforms currently underway in the energy sector that are designed to reshape retail market settings – anecdotally, about 30 energy-specific rule and law changes are set to come into effect in 2026 alone.

Sitting on top of this is the AEMC's Pricing Review which is proposing significant changes to how the energy retail market works. This Review is currently at the Draft Report stage and has flagged reforms targeted at disengaged customers. There will be robust discussions between the market body, industry and consumer groups about how these reforms should be designed to benefit customers and mitigate any unintended outcomes to the competitive retail market.

Furthermore, the ACCC's most recent Inquiry into the National Electricity Market report shows that the number of customers on newer plans is increasing, while those on offers above the DMO is decreasing. Overall, the ACCC observes that "competition is an important feature of the retail electricity market and is the mechanism that allows customers to access plans at lower prices than the default offers".[2]

Proceeding with this provision would have significant, deleterious impacts on retail market competition. The impacts to competition would include, but not be limited to:

- A significant barrier to entry for new entrants. For example, one strategy that some new and emerging retailers adopt is to introduce new products at prices that may not initially be profitable to incentivise customer take-up – it is unclear how that strategy could work without violating this law.
- Reducing the ability of retailers to innovate and compete. The ACCC, when entertaining this proposal, cautioned that it would require "careful consideration" because it "may effectively prescribe a business model for retailers and discourage innovation and dynamism".[3]
- Mischaracterising and restricting how retailers undertake prudent risk management. Retail prices reflect a portfolio of costs that covers wholesale, network, environmental, and retail costs. Wholesale and network costs represent by far the largest cost components of the electricity bill. Retailers may be compelled to act in an uneconomic way to minimise exposure to regulatory risk, which would be contrary to the benefits of a competitive retail market.

Placing this provision in the PEMM Act is not the best way to balance these considerations. If the Department maintains there is a problem to address, then it would be better handled through the AEMC's processes, probably the Pricing Review, rather than through amendments to the PEMM Act. Alternative options should only be considered where net benefits have clearly been identified.

[2] ACCC, December 2025, Inquiry into the National Electricity Market, p2.
[3] ACCC, January 2025, Submission to PEMM Act Review Consultation Paper.

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Meaning of "reasonable" – Options 2 and 3
The Consultation Paper sets out some options for how this provision could be applied. Option 2 proposes a "reasonable adjustments" test while Option 3 proposes a general requirement for "reasonable" pricing.

The AEC notes there have been repeated concerns raised about the meaning of these conditional aspects, and it has never been addressed. For example, the Law Council of Australia stated that the retail prohibition conditions are "inherently vague and subjective", have "no settled economic or legal meaning", and their interpretation "depends entirely on the particular context".[4]

The ACCC published guidelines that incorporated a range of examples to assist industry (and the regulator) to interpret the meaning of these provisions. But even with these guidelines, the ACCC concluded the retail prohibition to be "a complex evaluative task that has been difficult to implement in practice".[5]

These proposed amendments only contribute to the complexity of the provision, increasing the regulatory risk on retailers. The AEC notes that the ACCC's reasoning for publishing these guidelines were because "real-world practices in the electricity industry are complex and are likely to be impacted by various market factors and matters specific to a participant's portfolio of assets".[6]

This is emphasised because it is not clear how the regulator would determine what is or is not a reasonable price change. Retail pricing is inherently firm-specific and portfolio-based, and therefore not something that can be meaningfully assessed against generic or external benchmarks (such as the DMO) in a competitive retail market.

In a competitive retail market, retail cost structures and risk profiles are intentionally heterogeneous and so any form of benchmarking starts drifting toward de facto price regulation. This is not the intent of the reforms as the Consultation Paper states: *The policy intent of this option is not to introduce a form of price regulation*. But it is also not obvious how else the regulator could enforce a "reasonable" test under this provision.

Reversing the burden of proof – Options 2 and 3
The Consultation Paper seeks views on placing the burden of proof on retailers to provide evidence that changes in their prices are reasonable. Reversing the burden of proof goes against the fundamental principles of the rule of law and should only be reserved for rare circumstances, which do not exist here. Ambiguity in legislation should be addressed by resolving that ambiguity rather than by removing the need for proof of contravention.

It would also place an enormous cost burden on retailers to record and retain information about every retail pricing change they make, as well as being a regulatory barrier to new products and innovation.

The Department cites the example of a recent reform in Victoria (to take effect in July 2026) where retailers are required to ensure small customers on contracts older than four years are paying a

[4] Law Council of Australia, January 2025, Submission to PEMM Act Review Consultation Paper.
[5] ACCC, January 2025, Submission to PEMM Act Review Consultation Paper.
[6] ACCC, May 2020, Guidelines on Part XICA – Prohibited Conduct in the Energy Market.

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reasonable price. However, this portion of the market is incredibly small and even then, is still likely to form a not insignificant compliance burden. The proposal here would potentially capture all retail customers (including those in Victoria).

Proposal to address cross-market manipulation

The inter-relationship between multiple energy markets is critical to the efficient operation of those markets. Wholesale market participants, including electricity retailers, manage large risks arising from a variety of factors including the volatility of the spot market. The volatility of the spot market is by design. The volatile nature of the wholesale electricity spot market forces participants, including retailers and generators, to consider how to hedge their financial exposure to that market, which itself has been carefully designed to achieve multiple purposes. As the NEM Review observed:

> "The NEM was always intended to work as an integrated system of spot and derivatives markets. ... This structure was intended to ensure efficient allocation of generation and interstate trade in electricity, with high prices incentivising new generation as needed and sustained low prices encouraging the exit of excess or inefficient capacity."[7]

The introduction of a cross-market manipulation provision could undermine this intended design and inhibit otherwise normal market interaction between them. This would have significant detrimental consequences, reducing the efficient operation of those markets and result in higher costs for consumers, which the Department acknowledges in its Consultation Paper: *The department is conscious of the risk that such an approach could unduly constrain trading behaviour and that it is crucial that normal competitive behaviour is not misinterpreted or constrained to the detriment of customers.*

Given these risks, such reforms should be predicated on addressing a clear and current market problem that existing legislation cannot. The existing regulatory framework is already robust and gives the regulator powers to investigate and prosecute the type of behaviour that this provision is claiming to prohibit. For example:

1. Section 46 of the Competition and Consumer Act (CCA) contains a broad, economy-wide prohibition on the misuse of market power with an established legal test.
2. Section 1041A of the Corporations Act applies to trading in financial contracts and deals with market manipulation, including conduct that creates or maintains artificial prices.

There are also provisions in Part XICA of the CCA, namely provisions 153F, 153G, and 153H, that regulate conduct in the electricity financial contract and spot markets. These provisions were designed with reference to addressing market power. The fact those provisions have not been relied upon in enforcement proceedings does not mean they are insufficient. Given the degree of public interest and regulatory scrutiny of the industry over recent years, it is more likely to suggest there is no clear behavioural problem to address. This may be why the Consultation Paper has focused on examples that speculate on possible, future issues, such as misuse of market power and AI trading.

The AEC does not consider these future issues to be likely and does not justify introducing a sector-specific provision with a lower burden of proof to the economy-wide provision. It is expected that the energy transition will decentralise generation sources which should bolster the competitive operation of the wholesale markets and be a natural structural barrier against the

[7] National Electricity Market Wholesale Market Settings Review, p30.

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accumulation of market power. Indeed, the NEM Review repeated observations from the AER that "market concentration has reduced in recent years as the energy transition has brought new players into generation and retail markets".[8]

As for AI trading, a recent AEMC paper brought it to the attention of the NEM Review Panel and energy stakeholders. That paper notes there are trade-offs that come with the potential widespread use of AI trading for algorithmic pricing. It advises policymakers that "care needs to be taken to not unduly restrict the use of AI given its use has the potential to reduce costs for consumers".[9] The AEC does not consider this proposed provision shows the necessary care in balancing these trade-offs and the contemplated PEMM prohibition would not be an appropriate or targeted way to address the specific issues that could arise from AI as it develops over coming years.

AI is ultimately a technology still developing, regularly hallucinates and cannot yet replicate the abilities of humans in many of the day-to-day activities carried out by market participants. The fact that AI could one day be more capable does not justify enacting legislation now to solve a problem that does not even currently exist.

The likeliest effect of this provision would be to reduce the efficiency of existing markets that operate based on human decision making (aided by technology) as they now manage increased regulatory risk. The level of regulatory risk is especially high since the provision is not restricted to an "intent" element, also penalising behaviour that has the "effect or likely effect" of substantially lessening competition.

Absent repeal of the PEMM Act, the AEC firmly favours *Option 1: Spot market only with no changes to current rules*.

If the Department does proceed with a new provision, which the AEC does not support, then the AEC submits the provision should be narrowed to only prohibit behaviour that is done with "the purpose" of substantially lessening competition. The extended scope of "effect or likely effect" should be removed. While this does not address all the AEC's concerns, it might at least reduce the most egregious regulatory risk and uncertainty of the proposed provision.

The AEC also suggests the scope of the obligation be limited to consideration of the impact of behaviour in the primary spot market on the contract market, given the complexity of the other options proposed.

Finally, there should be clear regulatory guidance published on what would and would not constitute cross market manipulation (along the lines of the existing ACCC Guidelines on Part XICA) to explicitly recognise legitimate commercial practices.

Transfer of reporting responsibilities from ACCC to AER

The AEC supports winding down the NEM Inquiry and allowing market monitoring responsibilities to be handled through the AER. The AER already produces a wholesale electricity market performance report and is familiar with network regulation. Accordingly, it would be well placed to analyse what is driving retail prices across the energy supply chain.

[8] National Electricity Market Wholesale Market Settings Review, p30.
[9] AEMC, Addressing the risk of algorithmic collusion, p9.

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The AEC would prefer the ACCC to retain responsibility for the enforcement of the Electricity Retail Code and PEMM provisions. This is because:

- Consistency of regulatory practice – section 153F uses the same legal test as other anti-competitive provisions enforced by the ACCC across the economy (the 'substantial lessening of competition (SLC)' test). The ACCC itself has observed that it is important for the SLC test to be consistently applied and enforced.[10] Creating a new test for a new regulator goes against the legal principles that law should be clear and consistent.
- Change creates risk and uncertainty – enforcement of regulatory provisions is a difficult and nuanced role. When done well, it can provide the predictability necessary for corporations to operate efficiently to the benefit of customers. A new regulator, even one familiar to market participants, does introduce considerable uncertainty during a period of significant structural market change. It will likely take many years for a new regulator to fully transition into the role (noting the multi-year timeframes typically required for litigation to run its course and for regulatory practices to develop and be understood by the market).
- Separation of roles – given the AER is involved in setting prices regulated by the Electricity Retail Code, the separation of powers should dictate that a different regulator be charged with enforcing the relevant regulations.

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Yours sincerely,

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[10] ACCC, January 2025, Submission to PEMM Act Review Consultation Paper.